BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WC Docket No. 17-84
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79

COMMENTS OF COMCAST CORPORATION

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Comcast Corporation ("Comcast") hereby responds to the Wireline Infrastructure Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment ("*Wireline Notice*") and the Wireless Infrastructure Notice of Proposed Rulemaking and Notice of Inquiry ("*Wireless Notice*") adopted by the Federal Communications Commission ("Commission") in the above-referenced dockets.[1] These proceedings are inextricably connected, and, as explained below, the Commission should seek to facilitate and encourage *both* wireless and wireline broadband infrastructure deployment in a comprehensive and technology-neutral manner, both through constructive engagement with state and local governments and by identifying and removing regulatory barriers to investment.

I. INTRODUCTION AND SUMMARY

The broadband industry is poised to continue its significant infrastructure investments, driven by competition, technological evolution, and consumer demands, and buoyed by the

[1] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266 (2017) ("*Wireline Notice*"); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd. 3330 (2017) ("*Wireless Notice*").

prospect of a light regulatory touch from policymakers. Over the coming years, billions of dollars of potential U.S. investment will be analyzed and considered for both existing broadband networks and new 5G networks, including investments by new entrants. And the Commission's efforts to reinstate a light-touch regulatory framework for broadband Internet access, in this proceeding and others, will incentivize companies to make these investments.[2]

Against this backdrop, the Commission's decision to initiate these proceedings is a timely and welcome step. Based on Comcast's long history of investing in the communities we serve, the company is familiar with the effects – both positive and negative – that federal, state, and local policies can have on the deployment of broadband networks. For over 50 years, Comcast has worked with local and state officials on the deployment of communications services in their communities. The vast majority of these experiences have been positive: local governments typically understand and appreciate the tremendous economic, civic, social, and cultural benefits that accrue to their citizens from the availability of world-class, state-of-the-art communications services. As a result, Comcast's relationship with most of the communities it serves has been constructive, and Comcast has been able to deploy facilities that deliver cable, broadband Internet, voice-over-IP ("VoIP"), and numerous other communications services for consumers, businesses, institutions, and enterprises, in a manner that accounts for the concerns and interests of local governments, particularly with respect to the use of their public rights-of-way.

In light of that experience, the Commission's first priority should be to continue to work constructively with state and local government authorities, such as through the Broadband Deployment Advisory Committee, to identify opportunities to speed the deployment of

[2] *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, WC Docket No. 17-108, FCC 17-60 (May 23, 2017).

broadband. For example, the Commission could engage with state and local governments to identify and develop best practices and policies that incentivize deployment and minimize delays caused by onerous regulatory requirements that differ from community to community.[3] Moreover, the Commission could work with industry to educate local officials on the impact that process-generated delays and excessive fees have on access to broadband in their communities. Ultimately, the Commission is likely to be more effective through a constructive relationship with state and local authorities than a confrontational one.

Nevertheless, there are some state and local governments which, for a variety of reasons, have taken steps that unduly burden and establish barriers to the deployment of these communications facilities. These outliers represent a small minority of the country's state and local governments, but they stand in the way of the realization of national policy regarding the ubiquitous deployment of communications facilities. Congress recognized the harmful effects that excessive fees and unreasonable conditions can have on the deployment of communications facilities when it adopted the 1978 Pole Attachment Act and the 1984 Cable Act, and later in the Telecommunications Act of 1996 it adopted Section 253 to give the Commission express preemptive authority to identify and surgically address the problems caused and barriers raised by these outliers. The Commission can use these tools to identify and eliminate harmful policies and practices, thereby facilitating the investments that will be critical to the speed and success of wireless and wireline broadband deployment efforts.

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[3] *See, e.g.*, CTC Tech. & Energy, *Gigabit Communities: Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community* 62 (Jan. 2014), http://www.ctcnet.us/wp-content/uploads/2014/01/GigabitCommunities.pdf (recommending that localities adopt "formalized and well publicized" processes because "full transparency about these processes is the single most effective means by which to enable the communications industry to expeditiously plan and deploy networks").

In particular, there are a small number of reasonable, concrete steps that the Commission should take that will facilitate the timely deployment of broadband infrastructure and that will not impinge on the legitimate concerns and prerogatives of state and local governments. Specifically, the Commission should:

- Take measured steps to remove unnecessary, costly obstacles to the deployment of broadband facilities, including:
    - Unnecessarily granular and duplicative permitting requirements that burden city officials and lead to significant delays in deploying upgraded or new broadband infrastructure;
    - "In-kind" requests for contributions or services, unrelated to broadband deployment, that unreasonably increase the cost of broadband infrastructure deployment; and
    - The imposition of additional processes, requirements, or fees on franchised cable operators that provide broadband services over a cable system deployed pursuant to an existing franchise agreement.
- Ensure that its pole attachment regime is carefully balanced to protect the interests of utilities, existing attachers, and new attachers, including by:
    - Declining to adopt harmful "one-touch make-ready" proposals and, instead, focusing on "right-touch make-ready" proposals;
    - Ensuring that municipal and cooperative pole owners are not allowed to impose unreasonable rates, terms, and conditions on any attachers; and
    - Implementing limited safeguards – such as making pole cost data publicly available and excluding capital costs from recurring pole attachment rates – to make sure that regulated entities charge reasonable pole attachment rates.

Finally, the Commission should streamline its discontinuance processes by eliminating the "functional test" and clarifying that a provider does not need Section 214 authority if it will continue to offer a comparable service after a discontinuance. This will facilitate the availability of updated and improved service offerings.

In adopting these measures, the Commission should be guided by its longstanding principles of technology- and provider-neutrality. Policies that focus on a particular type of technology or service, or that have the effect of burdening one set of providers more than others,

are likely to be incomplete and ineffectual. For example, focusing solely on removing impediments to wireless facility siting may well encourage the deployment of more 5G antennas, but it does not address the need for additional fiber deployments to backhaul all the traffic that will be generated by consumers and services using those antennas.[4] Accordingly, the Commission should continue to move forward in both proceedings jointly.[5] This will ensure that its actions address and encompass the issues confronted by all broadband providers, regardless of the type of technology used, and that it meets its ultimate goal of "an updated regulatory framework that promotes and facilitates next generation network infrastructure facility deployment."[6]

II. THE COMMISSION SHOULD TAKE REASONABLE STEPS TO ADDRESS STATE AND LOCAL PROCESSES THAT UNNECESSARILY IMPEDE BROADBAND DEPLOYMENT.

The Commission is well-situated to successfully and meaningfully advance its goal of increasing consumers' access to broadband. Constructive engagement with state and local officials to identify and eliminate barriers to deployment is likely to garner significant benefits. And in those isolated situations where such engagement does not produce the desired results, the

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[4] *See* Sean Buckley, *Adtran's Stanton: Fiber Will Be a Key Component of 5G Deployments*, FierceTelecom (Apr. 19, 2017), http://www.fiercetelecom.com/telecom/adtran-s-stanton-fiber-will-be-a-key-component-5g-deployments. As Comcast has explained to the Commission in other proceedings, wireless providers already predominantly rely on fiber-based services, and "as the nation moves to 5G, those speed, performance, and reliability benchmarks for backhaul will only grow more exacting and more critical to the success of the technology." Comcast Comments, WC Docket Nos. 05-25, 15-247, & 16-143, at 6 (June 28, 2016).

[5] *See*, *e.g.*, Joint Motion to Align Comment Dates of CTIA, Competitive Carriers Association, and the Wireless Infrastructure Association, WT Docket Nos. 17-79 & 17-84, at 2 (May 24, 2017) ("Both proceedings share a common objective to address and remove federal, state, and local regulatory barriers that impede the deployment of network infrastructure needed to provide high-speed broadband nationwide," and "many issues that the Commission raises in the items affect both wireless and wireline providers."); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Order, WT Docket No. 17-79, DA 17-525, ¶ 3 (May 26, 2017) ("[W]e agree that it is in the public interest to align the pleading cycles of these two proceedings[.]").

[6] *Wireless Notice* ¶ 1.

Commission has the tools to address barriers on its own. In particular, the Commission should prohibit permitting processes that are unnecessarily granular and duplicative and requirements for "in-kind" contributions that are unrelated to broadband deployment. These requirements unnecessarily impede and raise the costs of deploying broadband facilities, wireless or wireline. Moreover, the Commission should reaffirm that cable operators operating with a franchise for access to public rights-of-way may not be saddled with even more procedures, requirements, and fees simply for providing additional services over facilities deployed pursuant to the franchise. Such additional requirements only serve to distort competition, hinder the deployment of broadband services, and are contrary to Congressional policy and the plain meaning of Sections 621, 622, and 624 of the Communications Act.

All of these steps comport with the Commission's statutory authority. Under Section 253 of the Communications Act, and consistent with the Congressional policy set forth in Section 706 of the 1996 Telecommunications Act, the Commission can and should take reasonable steps to address state and local processes that unnecessarily impede broadband deployment, regardless of the classification of broadband Internet access service. Broadband infrastructure supports the deployment and use of numerous services, including telecommunications services, and local and state requirements that impede the deployment of broadband facilities frustrate Congressional intent and unambiguous federal policy to encourage and facilitate the deployment of these networks and the services they enable.

A. Permitting Processes Should Be as Efficient as Possible, and the Geographic Scope of Permits Should Align with the Geographic Scope of Proposed Projects.

Section 253 and other provisions of the Communications Act recognize that states and localities possess the right to manage the rights-of-ways within their communities. By and large, many states and localities exercise this right in a manner that is fair, nondiscriminatory, and

reasonably related to the management of the rights-of-way.[7] But some state and local governments have permitting requirements that are inefficient and duplicative, and that severely limit the geographic scope covered by a permit, placing the onus on providers to obtain numerous permits from a single government in order to complete large-scale deployment projects within the government's jurisdiction. As a result, providers can be subject to increased costs and needless backlogs as city officials struggle to process applications (that are often largely duplicative of each other).

Comcast's experience is instructive. While some cities Comcast serves, such as San Jose and Sacramento, have relatively efficient processes that result in an average wait time for permit approvals of less than 30 days (and in some cases less than 2 weeks), other cities in the area have multi-stage, inefficient processes – such as requiring approvals from multiple departments in seriatim rather than in parallel – that result in average delays of two months or more. In some cases, Comcast has had to wait 6 to 10 months while applications to deploy new fiber facilities wound their way through these processes. These delays are unnecessary, as evidenced by the fact that many cities can act in a much more efficient manner, and they produce a ripple effect throughout the deployment process that costs time and resources, and, most importantly, prolongs the wait consumers must endure before they can receive new or upgraded service.[8]

When permitting processes extensively prolong the period providers must wait before deployment, they have the effect of prohibiting the provision of service in violation of

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[7] 47 U.S.C. § 253(a), (c).

[8] Comcast is not the only broadband provider that recognizes the burdens of overly-granular permitting processes. In its "City Checklist," Google states, "We would like the applicable area [covered by a permit] to be as large as possible, ideally covering the entire city. If not, the applicable area [covered] should be a minimum of either: twenty-thousand (20,000) households [or] three-hundred (300) route miles of underground installation." Google Fiber, *Google Fiber City Checklist*, app. 3A (Feb. 2014), https://fiber.storage.googleapis.com/legal/googlefibercitychecklist2-24-14.pdf.

Section 253. This is not a hypothetical problem. As mentioned above, Comcast has experienced costly delays in some communities that have effectively impeded broadband network investment projects that are designed to benefit consumers, businesses, institutions and enterprises. These processes also violate Section 253(a) by "materially inhibit[ing] or limit[ing] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment in the market."[9] The unreasonably granular and duplicative processes undoubtedly favor small-scale deployments over larger ones, and limit some ISPs' ability to compete fairly against providers that seek to deploy in smaller geographic areas. Moreover, disfavoring larger-scale deployments creates a perverse incentive for providers to "redline" or "cherry-pick" areas, something cable companies are prohibited from doing. That result is starkly at odds with the Commission's efforts to promote widespread broadband deployment, particularly in unserved rural areas where massive deployments are needed.

To minimize delays in state and local review, the Commission should prohibit inefficient and duplicative permitting processes and find that the permits providers are required to obtain to access rights-of-way should have a geographic scope commensurate with that of the proposed project. When Comcast has been able to obtain project-based permits, it has experienced a more efficient, effective process that is subject to fewer delays. For example, in the Philadelphia metro area, Comcast worked constructively with each of the municipalities involved in our

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[9] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, Cal. Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd. 14191, ¶ 38 (1997) ("*California Payphone*"); *Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007); *see also Wireline Notice* ¶ 108. Delays in processing providers' requests can constitute obstacles that materially inhibit providers from providing service in violation of Section 253. *See, e.g.*, *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002) ("Similarly, the extensive delays in processing TCG's request for a franchise have prohibited TCG from providing service for the duration of the delays. In light of the obstacles that the Ordinance poses to TCG's ability to compete in White Plains on a fair basis, we conclude that the Ordinance violates § 253(a).").

proposed fiber deployment. Comcast provided comprehensive information and documentation regarding the project, such as expected construction dates and activity, and the municipalities, as necessary, granted Comcast a "blanket permit" to move forward with construction work. The result was much more rapid deployment of upgraded facilities and services than what Comcast has experienced in some other areas.

Eliminating duplicative processes and requiring permits to be granted commensurate in geographic scope with proposed projects also would yield benefits to governments as well as consumers. State and local officials would have fewer, largely duplicative, applications to review, freeing up resources for more efficient uses. And new and upgraded broadband infrastructure and services would be deployed more rapidly to the ultimate benefit of consumers, businesses, institutions, and enterprises.

B. The Commission Should Prevent Cities and States from Imposing Conditions Unrelated to the Deployment of Broadband Facilities.

Some localities have viewed broadband deployment and the permitting process as an opportunity to extract concessions unrelated to the projects for which providers seek access to rights-of-way. Comcast has been required to go above and beyond the construction necessary to complete deployments to perform unrelated work for cities as a condition of being able to do any construction in city rights-of-way. In some cases, Comcast has been required to repave an entire lane or block, despite the deployment project requiring little more than a minor cut in an isolated portion of the road. Other cities have required Comcast to bring street curbs that were completely unaffected by and unrelated to the deployment project into compliance with federal requirements. And, despite the fact that Comcast has devoted significant resources to closing the digital divide through its *Internet Essentials* program, some cities have demanded that Comcast extend the program or undertake *additional* digital literacy training or broadband adoption

programs as a condition of renewing a franchise agreement. As the Commission has recognized, these types of ancillary, in-kind contributions can raise costs and delay the provision of service.[10] The Commission should put a stop to them.

The Commission should declare that additional fees, demands for "in-kind" contributions, or other conditions that impose costs unrelated to rights-of-way management presumptively violate Section 253. Such requirements have the effect of prohibiting some entities from providing services within the meaning of Section 253(a). Courts have found that any form of compensation "that is not based on [a provider's] use of City rights-of-way violates § 253(a) of the [Act] as an economic barrier to entry."[11] Moreover, these requirements are not "fair and reasonable compensation" within the meaning of Section 253(c). Courts' "most favored interpretation" of Section 253(c)'s "fair and reasonable compensation" provision "requires that the fees charged by a municipality be related to the degree of actual use of the public rights-of-way."[12] While it may be reasonable for a city to "require a company to pay fees to recover an appropriate share of the *increased* street repair and paving costs that result from repeated excavation,"[13] it is unreasonable to require a provider to pave portions of a road beyond those that are affected by the provider's construction-related activities.

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[10] *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, ¶ 105 (2007) (finding that in-kind payments unrelated to the provision of service "have a negative impact on the entry of new . . . competitors in terms of timing and cost").

[11] *AT&T Commc'ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) (determining that a fee equal to four percent of a carrier's revenue from all services provided in the city was not reasonably related to the carrier's use of city rights-of-way and thus impermissible under Section 253(a)).

[12] *P.R. Tel. Co.. v. Municipality of Guayanilla*, 283 F. Supp. 2d 534, 543-44 (D.P.R. 2003); *see also P.R. Tel. Co., Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 21-24 (1st Cir. 2006).

[13] *See Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd. 13082, ¶ 39 (1996) (quoting 11 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein)) (internal quotations marks and citations omitted) (emphasis added).

C. The Commission Should Reaffirm That Franchised Cable Operators Have the Right To Use Their Cable Systems To Provide Broadband in Addition to Cable Service Without Additional Authorization or Assessments.

Under the franchising regime established by the 1984 Cable Act, which includes the imposition of a revenues-based franchise fee for access to rights-of-way, Comcast is often able to work constructively with franchising authorities to deploy cable systems and upgrades that support the deployment of a variety of communications services, including broadband Internet services. Every year, Comcast remits *hundreds of millions of dollars in franchise fees to the communities we serve*. Despite this, certain advocates for taxation of broadband have taken the position that local authorities may require cable operators with existing franchises to pay additional fees to provide broadband services *over the same facilities*, even when those services impose no incremental burden on the public rights-of-way.[14] These practices impose additional impediments on top of processes that apply only to cable operators, hampering investment in those communities and distorting competition. The Commission should prohibit these practices by reaffirming that a cable operator with a franchise to provide cable service has a statutory right to use the rights-of-way to provide broadband services over its cable system, and need not obtain any additional or separate franchise, license, or authorization (or pay any additional fees) to exercise that right.

The Commission has consistently concluded that the regulatory classification of broadband Internet service "should not affect *the right of cable operators to access rights-of-way as necessary to provide cable modem service [i.e., broadband service] or to use their previously*

[14] In *City of Eugene v. Comcast of Oregon II, Inc*., 359 Or. 528, 555 (2016), for example, the court erroneously rejected arguments that the Cable Act and Internet Tax Freedom Act barred a municipality from assessing a purported "license fee" on the cable operator's broadband revenues – even though the operator provided that service over the same cable system it used to provide cable service, and despite the fact that it already had a franchise authorizing it to use the public rights-of-way and paid franchise fees in exchange for that authorization.

franchised systems to provide cable modem service."[15] This is because a franchised cable operator's use of the same cable plant to provide additional services – including broadband Internet services, voice-over-IP, cellular backhaul, etc. – imposes *no incremental burden* to franchising authorities or public rights-of-way.

The Commission's previous guidance is consistent with both the statutory language and Congress's objectives. For example, Section 621(a)(2)'s use of the term "cable system" is significant because that term "is not limited to a facility that provides only cable service which includes video programming."[16] "[T]he House [R]eport accompanying the Cable Act clearly defeats [the] claim that a cable operator's facilities cease being a 'cable system' merely because they carry non-cable communications services in addition to video entertainment."[17] Rather, "cable operators are permitted under the provisions of [the Cable Act] to provide any mixture of cable and non-cable service they cho[o]se."[18]

Other Title VI provisions include similar language limiting state and local authority to impose additional obligations beyond those permitted in the franchise agreement. For example, Section 621(b)(3)(B) prohibits franchising authorities from imposing any requirement "that has

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[15] *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 102 (2002); *see also Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 n.1285 (2015) ("[W]e do not believe that the classification decision made herein would serve as justification for a state or local franchising authority to require a party with a franchise to operate a 'cable system' (as defined in Section 602 of the Act) *to obtain an additional or modified franchise in connection with the provision of broadband Internet access service*, or to pay any new franchising fees in connection with the provision of such services." (emphasis added)).

[16] *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co*., 6 FCC Rcd. 7099, ¶ 24 (1991) ("*Heritage Cablevision*") (quoting H.R. Rep. No. 98-934, at 44 (1984, *as reprinted in* 1984 U.S.C.A.A.N. 4655, 4681); *see also Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002) ("If one day . . . cable provides high-speed Internet access, in addition to cable television service, the cable does not cease . . . to be an attachment 'by a cable television system.' *The addition of a service does not change the character of the attaching entity* . . . ." (emphasis added)); 47 U.S.C. § 541(a)(2).

[17] *Heritage Cablevision* ¶ 24.

[18] H.R. Rep. No. 98-934, at 44, *as reprinted in* 1984 U.S.C.A.A.N. at 4681.

the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator."[19] Likewise, Section 624(b)(1) directs that franchising authorities "*may not*, except as provided in subsection (h) of this section, establish requirements for video programming or other information services."[20] Thus, regardless of whether broadband Internet access service is a telecommunications service or an information service, the Act prevents franchising authorities from imposing requirements or other obligations that would have the effect of hindering the deployment of such services.

The Commission has ample authority to act. If these additional fees are in fact extra franchise fees *or their functional equivalent*, the Commission may find such fees to be inconsistent with Section 622(b). Both the language of Section 622(i)[21] and basic precepts of administrative law afford the Commission authority to give effect to the Act's language,[22] including the portion of Section 622(b) that caps franchise fees.[23] Conversely, if the "license fees" and other costs are not franchise fees, as some have argued,[24] the prohibitions in Sections 621 and 624 would apply regardless, and the Commission would have authority to eliminate this broadband deployment barrier under Section 253. In either event, the principles of technology-

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19 47 U.S.C. § 541(b)(3)(B).

20 47 U.S.C. § 544(b)(1) (emphasis added). The 544(h) exception concerns notice of changes in programming or channel assignments, and therefore has no bearing here.

21 Under Section 622(i), federal agencies are prohibited from regulating franchise fees, "except as provided in this section." 47 U.S.C. § 542(i).

22 *See, e.g.*, *City of Arlington v. FCC,* 133 S. Ct. 1863, 1874 (2013) ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."); *see also ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the FCC has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees").

23 *See* 47 U.S.C. § 542(b).

24 *See, e.g.*, *City of Eugene*, 359 Or. at 555.

and provider-neutrality support the Commission's conclusion that "franchise fees could be taken into account when determining whether other types of fees are excessive."[25]

D. The Commission Has the Authority To Eliminate State and Local Regulatory Barriers to the Deployment of Broadband Infrastructure.

In the Telecommunications Act of 1996, Congress sought "to accelerate . . . deployment of advanced telecommunications . . . services to all Americans"[26] by arming the Commission with authority to remove regulatory barriers to the deployment of communications infrastructure.[27] This goal is especially apparent in Congress's addition of Section 253 to the Communications Act and its enactment of Section 706 of the Telecommunications Act. Section 253 authorizes the Commission to preempt state and local regulations that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[28] Section 706 establishes as a national policy "the deployment on a reasonable and timely basis" of broadband, and directs the Commission to use "regulatory methods that remove barriers to infrastructure investment."[29]

The Commission has relied on Section 253 to preempt certain unduly burdensome state and local regulations that were hindering Congress's goal of streamlining the deployment of communications infrastructure. For example, the Commission has said that state and local regulations that "materially inhibit[] or limit[] the ability of any competitor or potential

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25 *Wireline Notice* ¶ 104.

26 S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.).

27 *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("An Act to promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies* . . . .") (emphasis added).

28 47 U.S.C. § 253(a), (d).

29 *Id.* § 1302(a).

competitor to compete in a fair and balanced legal and regulatory environment" are subject to Section 253 preemption.[30] Courts, following the Commission's lead, also have enforced Section 253 to effectuate the Act's purpose by removing regulatory barriers that materially inhibit the provision of service,[31] including unreasonable delays in processing providers' requests.[32]

The Commission similarly can rely on its Section 253 authority to remove obstacles to broadband deployment. In the *Wireline Notice*, the Commission sought comment on its view that "restrictions on broadband deployment may effectively prohibit the provision of telecommunications service" within the meaning of Section 253(a).[33] This view is correct, *regardless of the classification of broadband Internet access service*. Section 253(a) expressly prohibits state or local requirements that "may . . . have the effect of prohibiting *the ability of any entity to provide* . . . telecommunications service."[34] The multipurpose broadband infrastructure

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30 *California Payphone* ¶ 31.

31 For example, the City of Santa Fe enacted an ordinance imposing substantial new costs on providers by charging them appraisal-based rent and requiring them to install excess conduit and dedicate that excess capacity to the city. The Tenth Circuit found that these provisions "'materially inhibit[ed]' the provision of service," held that they violated Section 253, and ordered that they not be enforced. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-71, 1274-75 (10th Cir. 2004); *see also P.R. Tel. Co.*, 450 F.3d at 19; *TCG N.Y., Inc.*, 305 F.3d at 76.

32 *See supra* note 9; *see also Ill. Bell Tel. Co.*, 503 F. Supp. 2d at 943-46 (citing the FCC's reasoning that "the current operation of the franchising process at the local level unreasonably delays and, in some cases, derails [new entrants' network upgrades] . . . [which] discourage[s] investment in the fiber-based infrastructure necessary for the provision of advanced broadband services" in determining that Illinois Bell stated a valid preemption claim against a municipality under Section 621(a)(1) and 253(a)).

33 *Wireline Notice* ¶ 101 & n.142.

34 47 U.S.C. § 253(a) (emphasis added). Although some courts have taken a "narrow" view of Section 253(a) by finding that a plaintiff must show an "actual or effective prohibition, rather than the mere possibility of prohibition," *see, e.g.*, *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 577-78 (9th Cir. 2008), other courts, including the First, Second, and Tenth Circuits, have remained more true to the FCC's *California Payphone* holding, finding that Section 253(a)'s "may . . . have the effect of prohibiting" language is implicated by state and local regulations that "materially inhibit" the provision of service, *see, e.g.*, *P.R. Tel. Co*., 450 F.3d at 18; *Qwest Corp.*, 380 F.3d at 1271; *TCG N.Y., Inc.*, 305 F.3d at 76. Of course, "the Commission has broad authority to render definitive interpretations of ambiguous [statutory] provisions," and "courts must follow such Commission interpretations." *Wireless Notice* ¶ 11 & nn.20-21.

deployed by broadband providers like Comcast facilitates the provision of *numerous* services, *including* telecommunications services.[35] For example, some commercial and institutional customers, such as schools and libraries, use Comcast's broadband infrastructure for data transport among sites, and certain wholesale customers use the infrastructure for long distance transport and termination service.[36] Because cable providers deploy broadband infrastructure for these types of telecommunications services, when states and localities raise barriers to broadband deployment, they materially inhibit the offering of such telecommunications services in those areas.

III. THE COMMISSION'S POLE ATTACHMENT REGIME MUST BALANCE THE NEEDS OF EXISTING AND NEW ATTACHERS, AND ENSURE THAT BROADBAND PROVIDERS HAVE TIMELY ACCESS TO ALL POLES AT REASONABLE RATES.

Comcast has significant experience working with utilities, municipalities, and others to attach our facilities to poles throughout our footprint in a way that minimizes interruption to existing attachers. We also have experience working with parties seeking to add their attachments to poles where Comcast equipment already is attached. Accordingly, we welcome the Commission's efforts to make the pole attachment process more efficient.[37]

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[35] Comcast, for its part, leverages its broadband infrastructure to provide non-private-carriage business data services ("BDS") to schools, libraries, and other institutions, and barriers to broadband deployment materially inhibit the provision of these services. What's more, the same multipurpose infrastructure Comcast deploys for broadband supports a range of other communications that have yet to be classified, and it will likely continue to support similar services – no doubt including many that have yet to be invented – for years to come.

[36] *See, e.g.*, Comcast Corporation, Comcast Enterprise Terms and Conditions, https://business.comcast.com/terms-conditions-ent (last visited June 15, 2017); Comcast Phone of California, LLC, Ethernet Transport Service Guide (July 1, 2010), https://cdn.comcast.com/~/Media/PDFs/Phone%20Terms%20of%20Service/Comcast%20Digital%20Phone/State%20Tariffs/California/CA_Ethernet_IXC_SG.pdf?rev=c586d0b2-8437-4e7c-b7f6-ac67c1968e7d; Comcast Phone of Minnesota, Inc., Access Services Price List (Aug. 15, 2013), https://cdn.comcast.com/~/Media/PDFs/Phone%20Terms%20of%20Service/Comcast%20Digital%20Phone/State%20Tariffs/Minnesota/MN_Access_Section_4.pdf?rev=56121be4-e885-4876-a6e1-29662da22eb7.

[37] *Wireline Notice* ¶ 6 (seeking comment on a number of proposals designed to "streamline and accelerate the Commission-established timeline for processing pole attachment requests").

The Commission emphasized that it is "seeking to develop an approach that balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public."[38] We agree. To achieve this balance, the Commission should:

- Adopt "right-touch make-ready" proposals, rather than the "one-touch make-ready" approaches that lead to service disruptions and other harms for existing attachers and their customers, and conflict with the statutory protections of Section 224;
- Take steps to ensure that unreasonable rates and unnecessary delays for access to poles owned by municipalities and cooperatives do not impede broadband deployment; and
- Implement limited additional safeguards to ensure that regulated entities offer pole attachment rates, terms, and conditions that are just and reasonable, such as a requirement that incumbent LECs publicly provide disaggregated pole cost data and rules that exclude capital costs from pole attachment rates.

We discuss each of these recommendations below.

A. Improvements to the Current Pole Attachment Regime Must Uphold the Rights of Existing Attachers and Their Customers.

The Commission should consider common sense changes to the rules that would make the pole attachment process more efficient for all parties. Comcast supports the "right-touch make-ready" ("RTMR") proposals in the *Wireline Notice*, as they would maintain the balance that the Commission has long sought to strike between encouraging deployment and safeguarding existing networks, services, and customers. In contrast, some of the alternative frameworks mentioned in the *Wireline Notice* – particularly those based on the "one-touch make-ready" ("OTMR") approaches adopted in Nashville and Louisville – should be rejected because they would upend the balance in the Commission's rules without adequate consideration for the security, reliability, and integrity of existing facilities and services.

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38 *Id*.

The Commission's current rules establish a four-step process that service providers seeking to attach their equipment to utility poles must follow. As the Commission notes, the first three steps are "application review and engineering survey (45 days), cost estimate (14 days), [and] attacher acceptance (14 days)."[39] The fourth and final step is the make-ready phase, in which each existing attacher is given 60 days (and up to 105 days for larger orders) to perform the necessary make-ready work on its own equipment.[40] Only in the event that "existing attachers have not moved their facilities within 60 [or 105] days of notification" may a pole owner or new attacher "move [existing attachers'] facilities for them."[41] As the *Wireline Notice* recognizes, "in crafting the pole attachment timeline adopted in 2011, the Commission sought to strike a balance between the goals of promoting broadband infrastructure deployment by new attachers and safeguarding the reliability of existing networks."[42] In Comcast's experience, the Commission's current timeline and process generally have proven to be workable.

Comcast also appreciates the Commission's desire to refine its approach in a manner that continues to account for the interests of all stakeholders. In that vein, Comcast believes the RTMR framework set forth in the *Wireline Notice* would achieve the appropriate balance and be consistent with the requirements of Section 224. Among other things, new attachers would benefit from shortened timeframes. For example, under the RTMR framework proposed in

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39 *Wireline Notice* ¶ 7; *see also* 47 C.F.R. §§ 1.1403(b), 1.1420.

40 *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240 ¶ 22 (2011) ("*2011 Pole Attachment Order*"); *see also* 47 C.F.R. §§ 1.1420(e), (g)(3).

41 *2011 Pole Attachment Order* ¶¶ 8, 32; *see also* 47 C.F.R. § 1.1420(e).

42 *Wireline Notice* ¶ 18 (citing *2011 Pole Attachment Order* ¶ 61).

Nashville, a utility would have 30 days to review and approve or reject a pole attachment application, rather than the 45 days provided under the current federal regime.[43]

An RTMR approach also would ensure that existing attachers continue to receive the statutory protections afforded by Section 224. In particular, an existing attacher would be provided with the prior written notification required by Section 224(h) and a reasonable opportunity to modify its existing attachment. The Nashville RTMR proposal would give existing attachers 45 days to perform any make-ready work on their facilities before the new attachments are added (down from the 60-day period afforded under the Commission's rules).[44]

The Commission also could build on existing RTMR proposals in a manner that appropriately balances the interests of new and existing attachers. For example, some RTMR proposals include monetary penalties for existing attachers that fail to complete necessary make-ready work within the required timeframes. This type of mechanism should serve to deter existing attachers from unreasonably delaying make-ready work in those rare circumstances where it may happen. To the extent the Commission seeks to adopt other mechanisms to deter delay, the Commission should ensure that existing attachers be provided with adequate protections against damage to their facilities. For example, any work performed by a new attacher without the involvement of the existing attacher must be (1) authorized only after a reasonable period in which the existing attacher can modify its own equipment, and (2) accompanied by indemnification from the new attacher sufficient to cover all liabilities resulting from any service interruption or other harm caused by the new attacher. Similarly, new

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[43] Nashville Resolution No. RS2016-380, § 1 (Sept. 20 2016), http://www.nashville.gov/mc/resolutions/term_2015_2019/rs2016_380.htm.

[44] *Id.*

attachers should be responsible for repairing any damage or defects to existing attachers' facilities that are discovered by existing attachers upon inspection after the work is completed.

OTMR frameworks, by contrast, disregard the balance that the Commission has long sought to maintain in its pole attachment rules. Such frameworks ignore the statutory protections Section 224 affords to existing attachers, and create significant risks of service disruption and other harms for those service providers and the consumers they serve. *Comcast and its customers have already suffered numerous service outages as a result of make-ready work being performed by third parties*.[45] These harms will be exacerbated under OTMR proposals.

For instance, the OTMR ordinance adopted in Nashville provides only 15 days for an existing attacher to perform make-ready work on its own equipment before a new attacher may do so – or 30 days when the new attacher unilaterally concludes that the make-ready work is "complex" and likely to cause an outage.[46] Given the need to schedule around contractors' existing workloads, coordinate make-ready work with other existing attachers, and account for weather hazards and other extrinsic sources of delay, these extremely limited time periods do not provide a reasonable opportunity for existing attachers to perform necessary make-ready work in most cases, particularly for orders involving attachments on dozens or even hundreds of poles.

OTMR frameworks adopted in other jurisdictions go even further in trampling the rights of existing attachers. An ordinance adopted in Louisville generally purports to authorize new attachers to move or alter existing attachers' equipment with *no* prior notice at all and *no* opportunity for existing attachers to perform the make-ready work on their own (and gives

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45 For example, in April 2017, Comcast suffered three separate incidents where the improper handling of equipment during removal or reattachment to poles by third parties without Comcast's knowledge negatively affected service to our customers.

46 *See* Nashville, Tenn., Ordinance BL2016-343, § 13.18.020(A) (2016).

existing attachers only 30 days to perform make-ready work if *the new attacher* concludes an outage is likely).[47] And a statute recently enacted in West Virginia likewise affords *no* notice to existing attachers before new attachers may move or alter their equipment (or 45 days' notice if the new attacher unilaterally determines an outage is likely).[48] These frameworks contravene Section 224(h), which mandates that existing attachers receive *prior* notification of plans to modify or alter a pole and does not distinguish between "routine" and "complex" requests.[49]

By depriving existing attachers of any reasonable opportunity to move their own equipment, OTMR proposals also "raise meaningful concerns about safety and protection of existing infrastructure."[50] Damage is likely to result even from work performed by well-intentioned new attachers, because third-party contractors generally will not be familiar with the existing attacher's network and service quality standards.[51] And these concerns are compounded by the fact that many of the new attachers are likely to be competitors of the existing attachers, so the entity supervising the make-ready work will have little economic incentive to implement measures designed to avoid harm to existing equipment on poles. Comcast has experienced this dynamic firsthand in Nashville, where, at last count, roughly *40 percent* of the instances of make-ready work performed by Google Fiber contractors on Comcast's equipment violated

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47 *See* Louisville, Ky., Ordinance O-427-15, § 116.72(D)(2) (2016).

48 *See* W.V. House Bill 3093, § 31G-4-2(a) (effective July 7, 2017), http://www.legis.state.wv.us/Bill_Text_HTML/2017_SESSIONS/RS/bills/HB3093%20SUB%20ENR.pdf.

49 47 U.S.C. § 224(h).

50 *Wireline Notice* ¶ 6.

51 Certain OTMR ordinances have purported to protect against substandard work and damage to networks by requiring contractors to be selected from a list pre-approved by the pole owner. The problem with this remedy is that existing attachers use different network technology and equipment, and have different maintenance and equipment protocols. Consequently, a contractor that is familiar with one technology or equipment type may not be familiar with the technology or equipment of the attacher that it must move to accommodate the new attachment.

requirements set forth in the National Electrical Safety Code – standards that are designed to ensure the safety and security of electrical and communications networks.

The safety and property concerns that OTMR frameworks present – which the *Wireline Notice* appropriately characterizes as "paramount"[52] – are not mere inconveniences for existing attachers and their customers. Rather, they threaten public safety and violate both the Constitution and current federal law governing pole attachments. As the Commission notes, the Fifth Amendment protects utilities and existing attachers against the taking of their property without just compensation,[53] and Section 224(i) provides that existing attachers "shall not be required to bear any of the costs of rearranging or replacing its attachment" resulting from an additional attachment by another entity.[54] If a new attachment causes damage to equipment already installed, Section 224(i) entitles the existing attacher to compensation. This includes not only the cost of repairing the affected equipment, but also costs related to any disruption of service to the attacher's customers.[55] An OTMR proposal that compensates an attacher only for the damage to its equipment falls well short of "just compensation" because it ignores the much more significant harm to the provider's customers and reputation.

Proponents of OTMR approaches cannot justify such a dramatic departure from the balance that the Commission has always sought to achieve and that is reflected in Section 224. The *Wireline Notice* cites no evidence that widespread delays in performing make-ready work

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52 *Wireline Notice* ¶ 13.

53 *Id.*

54 47 U.S.C. § 224(i).

55 For example, certain enterprise-level services Comcast delivers over its broadband facilities come with Service Level Agreements that could require Comcast to provide customers impacted by an outage with significant credits even when the outage is caused by third-party damage to Comcast's equipment. *See, e.g.*, Comcast, Enterprise Dedicated Internet PSA, https://business.comcast.com/terms-conditions-ent/enterprise_dedicated-internet-psa (last visited June 15, 2017).

are impeding broadband deployment – which is unsurprising, as make-ready work typically is performed promptly within the periods set forth under the existing rules. To the extent there are some isolated examples of delay, such examples may justify changes consistent with the RTMR proposals, but they are not sufficient to justify adopting or endorsing radical policies like OTMR. Consistent with the *Wireline Notice*'s repeated acknowledgement of the need to ensure safety and the integrity of existing infrastructure,[56] the Commission should reject proposals to impose an OTMR framework or to endorse OTMR measures adopted at the state or local level.

B. The Commission's Pole Attachment Reforms Must Lead to Reasonable Rates, Terms, and Conditions for Poles Owned by Municipalities and Cooperatives.

In Comcast's experience, two of the primary barriers to broadband infrastructure deployment in areas served by municipal and cooperative utilities have been the unnecessary delays and unreasonable costs imposed for access to their poles. Taking steps to address these impediments would significantly improve broadband deployment efforts throughout the nation.

With respect to delay, Comcast has found that the processes for gaining access to and attaching equipment to poles owned by municipalities and cooperatives can be unreasonably burdensome and slow, resulting in needless delays in the deployment of broadband infrastructure in these areas. Among other concerns:

- A number of jurisdictions perform the engineering review of poles they own using in-house personnel. For the most part, however, these jurisdictions are not equipped with adequate personnel to complete that task quickly. Excessive delays in completing the initial phase of reviewing a permit request lengthen the duration of the entire permitting process and can lead to extended construction delays. For example, Comcast's largest Public Utility District in the state of Washington takes on average 103 days to process a permit request, approximately 40 percent longer than private utilities require.

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[56] *Wireline Notice* ¶¶ 6, 11, 12, 13, 15, 17, 18, 19, 28, 29.

- Worse yet, a number of municipal and cooperative entities fail to perform long-term maintenance on poles. As a result, Comcast and other similarly situated providers must pay for and complete the permitting and engineering requirements to replace the poles before adding even a single attachment.

- If Comcast disputes proposed rate increases, some cooperative pole owners refuse to issue new pole attachment permits until rate disputes have been resolved. For example, in Tennessee, the Duck River EMC per-pole rate increased every year from $9.50 in 2012 to $23.26 in 2017 despite the fact that Comcast had not entered into a contract reflecting this increase. When Comcast disputed the increase, along with other proposed terms, Duck River EMC stopped issuing all permits to Comcast, thereby effectively forcing Comcast to sign an unreasonable agreement.

- In other areas, Comcast has faced burdensome engineering review requirements that must be completed before attachments are made, requirements that Comcast negotiate separate agreements to attach wireless equipment to poles, and requirements that favor municipally-owned providers, such as regulations allowing municipalities to use space on utility poles for any purpose without charge.

Similarly, the fees associated with attachments to municipally- and cooperative-owned poles are frequently excessive. For example:

- In Florida, the weighted average pole attachment rate in 2016 for poles owned by incumbent LECs and private utilities was approximately $9.77, a figure reasonably close to Comcast's nationwide average pole rate of $8.48 for the vast majority of Comcast's poles. The weighted average rate for poles owned by municipalities and cooperatives was more than double this amount at approximately $22.08.

- In Comcast's "Big South" region, which covers much of the southeastern United States, Comcast paid a weighted average rate of approximately $6.26 for poles owned by incumbent LECs and private utilities. For poles owned by municipalities and cooperatives, however, the weighted average rate was more than twice as high at approximately $18.83.

These rates serve as an impediment to deployment in the many areas served by these poles, and increase the costs of providing broadband services.

Excessive pole rates also can have an adverse impact on competition in downstream retail marketplaces. In Chattanooga, Tennessee, for example, the majority of the poles on which Comcast facilities are attached are owned by EPB Electric Power, one of the largest municipally-owned electric power companies in the country. EPB also provides retail voice, video, and data

services in direct competition with Comcast. Comcast currently pays EPB a rate of $12.90 per pole in EPB areas, a cost that EPB does not incur, and almost 300 percent higher than the per-pole rate paid by Comcast to the largest investor-owned pole operator in Chattanooga.

To the extent that these unreasonable policies stem from any State or local "statute, regulation, or legal requirement," the Commission should use the ample authority it already possesses under Section 253 to preempt these practices.[57] As discussed above, given that broadband facilities installed on poles owned by municipalities and cooperatives can be and are used to provide telecommunications services to the public, the Commission has authority to act pursuant to Section 253.[58] Excessive pole rates and needlessly complex administrative processes effectively prohibit both the deployment of broadband service and the delivery of innovative telecommunications services that require upgraded network capabilities.[59]

To eliminate these unreasonable practices without imposing a prescriptive regulatory regime, the Commission should rely on Section 253 to preempt state and local pole attachment policies that presumptively have the effect of prohibiting the provision of service. For example, refusing to process new requests for pole access when involved in a rate dispute with the requesting entity plainly prevents that entity from providing service in the affected area. Similarly, attempts by state and local government entities to impose rates that are more than double the rates charged for other poles in the same area can have the effect of prohibiting potential providers from offering service and existing providers from upgrading their facilities to offer new services. Finally, states and localities should not be allowed to force broadband

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57 47 U.S.C. § 253.

58 *See* discussion *supra* at Section II.D.

59 *See Wireline Notice* ¶ 101 & n.142.

providers to apply for multiple permits to access a single pole.[60] After identifying these practices, the Commission then should make clear that they will be preempted unless a municipal or cooperative entity is able to demonstrate the reasonableness of its practices in question.[61]

Municipalities and cooperatives currently are able to charge excessive pole attachment rates, impose unreasonable conditions, and unduly slow down the grant of pole access to broadband providers because they are not subject to the regulatory safeguards outlined in Section 224.[62] The Commission should ask Congress promptly to close this regulatory void and give the agency explicit authority to subject the pole practices of municipalities and cooperatives to the regulatory safeguards outlined in Section 224. The original thinking behind the decision to exclude municipalities and cooperatives from the definition of "utility" in the Pole Attachment Act of 1978 was that (1) deployment of cable services in a community was a purely local issue, and (2) entities owned by the residents of the local community would be able to act in the interests of their owners.[63] Even if that rationale was sound in 1978, it cannot justify the continued exclusion of poles owned by municipalities and cooperatives from the nation's broadband policy. Congress has made deployment of broadband throughout the United States an issue of paramount national, not just local, importance. Further, one of the unfortunate

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60 *See* Bill Schrier, *Why Google Fiber will never come to Seattle*, Crosscut.com (Mar. 4, 2014), http://crosscut.com/2014/03/google-fiber-never-come-seattle-broadband-internet/ ("Attaching fiber cable to a pole in Seattle may require a pole attachment permit, a street use permit, and land use and environmental permits, among others.").

61 This proposed approach does not require the Commission to implement a prescriptive regulatory regime to govern poles owned by municipalities, analogous to the Section 224 regulations. Rather, it only requires the agency to exercise its Section 253 authority to eliminate practices prohibited by that statutory provision.

62 *See* 47 U.S.C. § 224(a).

63 *See* S. Rep. No. 95-580, at 17-18 (1977), *as reprinted in* 1978 U.S.C.A.A.N. 109, 125-26.

consequences of these short-sighted practices is that broadband services are delayed or denied to rural and remote areas where the availability of services could have profound benefits.

C. The Commission Also Must Ensure That Regulated Entities Are Not Permitted To Circumvent the Requirement That Pole Attachment Rates, Terms, and Conditions Are Just and Reasonable.

In addition to the measures set forth above, the Commission must ensure that the pole attachment rates of regulated entities are lawful. As set forth below, a few limited safeguards can go a long way to ensure that pole attachment rates comply with Section 224(b)(1)[64] and thereby advance the Commission's public interest goal of promoting the efficient deployment of broadband services to unserved and underserved areas of the country.

First, the Commission should require incumbent LECs to provide disaggregated pole cost data, including supporting assumptions and calculations, publicly and on an ongoing basis. For many years, the Commission's Part 32 accounting rules and associated reporting obligations provided an efficient administrative process for verifying that an incumbent LEC's proposed attachment rates were cost-based.[65] In a recent Order, however, the Commission permitted incumbent LECs to use Generally Accepted Accounting Principles ("GAAP"), rather than Part 32 accounting, to set their pole attachment rates.[66] In contrast to the prior regime, the new rules permit pole cost information to be maintained at a much more aggregated level of detail and do not require incumbent LECs to make the information publicly available, rendering it difficult for parties to ensure that these rates are reasonable.

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64 47 U.S.C. § 224(b)(1) (directing the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable").

65 47 C.F.R. §§ 1.1404(g)-(j), 32.2411, 32.6411.

66 *Comprehensive Review of the Part 32 Uniform System of Accounts; Jurisdictional Separations and Referral to the Federal-State Joint Board*, Report and Order, 32 FCC Rcd. 1735 (2017).

Because the Commission "share[d] the concern of some commenters that a change in accounting rules could lead to rate shock,"[67] it required a price cap incumbent LEC, upon request by an attacher, to submit to the FCC the accounting data used to develop the carrier's pole attachment rates for a particular state.[68] Although this requirement could be somewhat helpful, it is insufficient for a number of reasons. As an initial matter, this obligation was adopted for only three years with the option for the Commission to further extend the obligation by another three years.[69] The need for transparency plainly will not disappear in three (or even six) years.

Moreover, this information is available only to the Commission upon request, rather than being available to the public. Ready public access to pole cost data is necessary to ensure a level playing field during negotiations between pole owners and attachers and avoid needless disputes that drain party and Commission resources. As the *Wireline Notice* observed, "increasing transparency of cost information could lead to more efficient pole attachment negotiations."[70] Comcast's experience confirms this point: in the vast majority of cases, Comcast has been able to use the relevant pole cost and rate development information to reach agreement with pole owners. Absent access to this data, Comcast likely would have been forced to resort to filing a complaint or initiating litigation to oppose increases in pole attachment rates.[71] Indeed, the

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67 *Id.* ¶ 35.

68 *Id.* ¶ 39.

69 *Id.*

70 *Wireline Notice* ¶ 27.

71 *See, e.g.*, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations, et al.*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd. 7627, ¶ 63 (2013) ("Without ongoing access to the data derived from Part 32 accounts, neither the Commission nor interested parties could ascertain or verify that pole attachment rates . . . reflect actual costs, or that these calculations produce just and reasonable rates in accordance with our rules."); Letter from Steven F. Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 14-130, at 2 (Feb. 16, 2017) ("Under the current regime, rate complaints

Commission has noted that "[r]eliance on publicly available information has allowed pole owners and attaching parties to resolve rate issues without Commission involvement, which is a cost-savings benefit to utilities, cable operators, other attaching parties, and the Commission."[72]

The Commission can continue to avoid such unnecessary administrative costs that burden the agency and the industry (and ultimately consumers) by requiring that all pole owners subject to Section 224 make pole attachment cost data publicly available. Doing so will better ensure that the transition to GAAP does not permit incumbent LECs to impose unreasonable pole attachment rates. Relatedly, the Commission should confirm that attachers continue to have the right to receive access to the disaggregated pole cost information of incumbent LECs that was available before the GAAP decision.[73]

Second, the Commission should adopt its proposal to codify a rule excluding from pole attachment rates any capital costs that utilities already recover through make-ready fees.[74] There is no plausible basis for permitting a pole owner to recover capital costs (or any other costs) twice from pole attachers. Although the Commission's guidance on this matter has been clear for many years,[75] some utilities nonetheless continue to artificially inflate pole attachment rates

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involving ILEC pole owners are exceedingly rare because all the relevant information for calculating rates is publicly available and both sides to a negotiation understand where the end point should be . . . .").

[72] *2000 Biennial Regulatory Review – Comprehensive Review of the Accounting Requirements and ARMIS Reporting Requirements for Incumbent Local Exchange Carriers: Phase 2, et al.*, Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 19991, ¶ 48 (2001).

[73] *See* 47 C.F.R. § 1.1404(j) ("A utility must supply a cable television operator or telecommunications carrier the information required in paragraph (g), (h) or (i) of this section, as applicable, along with the supporting pages from its ARMIS, FERC Form 1, or other report to regulatory body, within 30 days of the request by the cable television operator or telecommunications carrier."); *id.* § 1.1404(h)(2) (requiring that calculations made in connection with these figures be provided to the complainant).

[74] *Wireline Notice* ¶ 38.

[75] *See*, *e.g.*, *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(e) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd. 12103, ¶ 77 (2001) ("Make-ready costs are non-recurring costs for which the utility is directly compensated and as

through these sorts of "double recoveries."[76] The Commission must address this inequitable outcome by adopting a bright-line rule that prohibits the recovery of such capital costs from pole attachment rates. As discussed above, this measure will be meaningful only if it is coupled with adequate transparency. If neither pole attachers nor the Commission have access to all of the relevant cost information, there will be no systematic, practical way of policing rule violations.

Finally, the Commission should make clear that pole owners may only recover incremental capital costs they incur to permit a new attachment through make-ready or other one-time, non-recurring charges. It is reasonable for a pole owner to recover the incremental capital costs of a new attachment through non-recurring charges assessed on the cost-causative customer – i.e., the new attacher. In contrast, capital costs associated with the initial installation of a pole are incurred for the benefit of the pole owner's utility customers and should be recovered from them. Pole owners, thus, should be barred from recovering any such capital costs through recurring pole attachment fees.

IV. THE COMMISSION SHOULD STREAMLINE THE DISCONTINUANCE PROCESS IN A MANNER THAT EASES THE BURDENS IMPOSED ON ALL SERVICE PROVIDERS.

Comcast supports the Commission's efforts to streamline its discontinuance processes by eliminating unnecessary, burdensome procedural requirements. These reforms will help to remove regulatory obstacles that needlessly interfere with a provider's incentive and ability to update and improve its service offerings over time.

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such are excluded from expenses used in the rate calculation."); *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, Memorandum Order and Second Report and Order, 72 FCC 2d 59, ¶ 27 (1979) ("[W]here a utility has been directly reimbursed by a CATV operator for non-recurring costs, . . . such costs must be subtracted from the utility's corresponding pole line capital account to insure that CATV operators are not charged twice for the same costs.").

[76] *Wireline Notice* ¶ 38.

As an initial matter, the Commission should eliminate its "functional test" as the criterion for determining whether a Section 214 discontinuance filing is required. Under the current approach, the Commission "evaluates the totality of the circumstances" to decide whether a filing is necessary, including "what the 'community or part of a community' reasonably would view as the service provided by the carrier."[77] This standard is too vague to provide meaningful guidance to service providers. As a result, the "functional test" has left the industry confused regarding the circumstances under which a carrier must seek discontinuance authority.[78]

To eliminate this uncertainty, the Commission should permit providers to determine whether a termination of service requires Section 214(a) approval on the basis of the service description contained in their tariffs and customer service agreements.[79] For this purpose, the service description would include any features or functions described in the relevant document. As the Commission has noted, this approach "will allow all parties to determine clearly when a discontinuance occurs based on objective criteria."[80] Furthermore, this standard will provide consumers with adequate prior notice when a carrier plans to cease offering a particular service.

The Commission also sought comment on analyzing a service discontinuance under Section 214 in the context of "the entire range of offerings that are available to a community, or

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77 *Technology Transitions, et al*., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd. 14968, ¶ 115 (2014).

78 *See*, *e.g.*, Petition for Reconsideration of the United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, at 2 (Dec. 23, 2014) ("The new definition is impermissibly vague and, instead of terminating a controversy or removing uncertainty, it creates unnecessary confusion."); Comments of NCTA, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, at 2 (Jan. 23, 2015) (noting that the Commission's Declaratory Ruling has "*created* controversy and uncertainty by eliminating a carrier's ability to identify the service for which it is responsible") (emphasis in original); Comments and Reply of NTCA – The Rural Broadband Association, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, at 3 (Jan. 30, 2015) ("[T]he Declaratory Ruling creates new uncertainty and confusion rather than resolving it.").

79 *Wireline Notice* ¶ 116.

80 *Id*.

part of a community."[81] Under this approach, a carrier would not need prior approval to cease providing a service as long as it offers a substitute service after the discontinuance. Hence, a carrier would not need to seek discontinuance authority when it updates its service offerings, so long as the carrier continues to make the same features and functions available in the affected area via other offerings. In that circumstance, "the overall 'service' that a community receives is not discontinued, reduced, or impaired."[82] This reading is further confirmed by final proviso of Section 214(a), which states that prior Commission approval is not required for "any changes in plant, operation, or equipment . . . which will not impair the adequacy or quality of service provided."[83] There can be no impairment if affected consumers will be able to obtain the same functionality from the same carrier's substitute offerings after the discontinuance.

In simplifying the discontinuance process, the Commission should ensure that it does not inadvertently impose unwarranted burdens on those carriers that will continue to offer service in a given area. For example, the Commission sought comment on a number of proposals that would streamline the discontinuance process for carriers that are able to demonstrate that other carriers provide competing services that are comparable to the service designated for discontinuance.[84] If it implements these proposals, the burden should be placed on the carriers

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81 *Id.* ¶ 123.

82 *Id*.

83 47 U.S.C. § 214(a).

84 *Wireline Notice* ¶ 87 ("[S]hould we require a statement identifying one or more alternative comparable data services available from the discontinuing provider or a third party provider at the same or higher speeds as the service being discontinued?"); *id*. ¶ 95 ("What type of showing would be required on the part of discontinuing carriers to demonstrate the existence of alternative services?").

seeking discontinuance approval to demonstrate that a comparable replacement service is available, and such a showing should be based on publicly available data.[85]

V. CONCLUSION

For the foregoing reasons, the Commission should take reasonable steps, under the authority granted by the Communications Act and consistent with its historic commitment to the principles of provider- and technology-neutrality, to remove unnecessary obstacles to the deployment of broadband facilities, ensure that its pole attachment regulatory regime properly balances the interests of all stakeholders and applies to all poles involved in deploying broadband, and streamline the procedures governing service discontinuances under Section 214.

Respectfully submitted,

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[85] *See* Reply Comments of NCTA, GN Docket No. 13-5, WC Docket No. 05-25, at 4 (Nov. 24, 2015) (discontinuance process should not require other companies operating in the same geographic area to respond to a lengthy and expensive FCC data collection request).